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File No. O. Presy Insolvency 145.
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Subject:—

Opinions under the Presidency-Towns Insolvency Act, 1909

P 7/45

File No. O. Presy Insolvency 145

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C O N T E N T S.

Legal Department File No. O.Prov.Insolvency/1945.

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In his petition at page 3 ante the Official Assignee of Bombay stated as follows:-

"Where an insolvent does not apply to the Court for his discharge under section 38 of the Presidency Towns Insolvency Act for a period of 18 months from the date of adjudication made against such insolvent his adjudication is liable to be annulled by the Court either on the application of the Official Assignee or of a creditor or of its own motion. Consequent upon such annulment of adjudication under section 23(1) of the Presidency Towns Insolvency Act the property of the debtor vests in such person as the Court may appoint, or in default of any such appointment reverts to the debtor on such terms and subject to such conditions if any as the Court may declare. The practice at present followed by the office of the Official Assignee with regard to the declation of dividends in such cases has been that only interim dividends in such cases has been that only interim dividends and not final dividends are declared. This practice is based on the view that having regard to the wording in which the vesting order under section 23(1) is made, the Official Assignee is in the position of a Trustee for all the creditors of the insolvent who had proved their debts and also for all creditors of whose claims the Official Assignee had notice and as such, Official Assignee is bound to provide for all the claims of which he has notice irrespective of the fact whether or not they have been proved. The result of such practice is that the Official Assignee has to make provision for all the claims of which he has notice even if any such claims are not proved and in a majority of cases the amounts of dividends provided for payment of such claims remain unclaimed and unpaid. Such unclaimed dividends are ultimately transferred to Government in the Unclaimed Dividend Capital Account under section 122 of the Presidency Towns Insolvency Act. The present practice of declaring interim dividends in Insolvencies which are annulled for want of prosecution works hardship on the creditors who are diligent in proving their claims as by reason of the provision made for unproved claims the dividends coming to these diligent creditors are greatly reduced. To avoid this difficulty and at the same time

to ensure that dilegent creditors get their full share of dividends by exclusion of all unproved creditors from participating in the dividend it is suggested that the wording of the order passed under section 23(1) of the Presidency Towns Insolvency Act be changed by substituion for the words "for the benefit of the creditors herein" the following words viz. 'for distribution according to the provisions of section 73 of the Presidency Towns Insolvency Act amongst the creditors who have proved their claims to the satisfaction of the Official Assigned".

On these facts he requested the High Court to amend the Bombay Insolvency Rules, 1910, by adding a fresh rule 136A as follows:-

"The order annulling the adjudication shall be in the Form No.112 in Appendix I hereto unless the Court hearing the application for annulment otherwise directs."

The High Court appears to be in general agreement with the view expressed by the Official Assignee in his aforesaid petition and has requested Government to give sanction to amending the rules as proposed by the Official Assignee. The Home Department appears to apprehend that the effect of the proposed amendment of the rules would be the loss of unclaimed dividends which at present are credited to Government. The R.L.A. is requested to examine the question.

2. Section 23(1) of the Presidency-towns Insolvency Act, 1909, provides that where adjudication is annulled, all sales and disposition of property and payments duly made, and all acts

therefore done, by the official assignee or other person acting under his authority, or by the Court, shall be valid, but the property of the debtor who was ~~xxjxxxxx~~adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appoint, shall revert to the debtor to the extent of his right or interest therein on such terms and subject to such conditions, if any, as the Court may declare by order. That provision is similar to section 37(1) of the Provincial Insolvency Act, 1920. In construing the latter provision Venkatasubb Rao in Nethaji Peraji Firm vs. Krishnayya, 52 Mad.p. 648 observed:

> "The scheme of the Act shows that in certain cases the annulling of the adjudication does not necessarily lead to the finally putting an end to the insolvency petition. This in my opinion is the correct view, and I am supported by Ex parte Lennard (1875) 45 L.J.(Bank), 49 and Thimmappa v. Devasi Harpal, (1929) Mad, L.R. 22. In the last mentioned case the question arose what was the effect of an order under section 39 annulling adjudication, which was made consequent on a scheme of composition, approved by the Court under section 38 ? It was held that the order did not bring the insolvency petition to an end and that the Court, although the adjudication was annulled, continued to retain control over the insolvent's assets.....At this point, a passage from Willimas' Bankruptcy may be quoted. The learned author while commenting on section 29 of the English Bankruptcy Act (which contains a sub-clause on which section 37 of our Act is modelled) says thus:-
>
> "Although in cases where the annulment is on the ground that the adjudication ought never to have been made, the Court will in all respects try to remit the bankrupt to his original position, yet in cases where the annulment is,

as it is under section 21, a continuance of the bankruptcy in another form, the rights of and against the bankrupt or the person in whom the bankrupt's estate becomes vested by the order of the Court in respect of that estate will remain as they were under the bankruptcy."

Reilly J. in the same Madras High Court case observed:

"Certainly it cannot be suggested that in this country annulment of adjudication puts the clock back as if the adjudication had never been ..... In my opinion, if the Court orders under section 37 that the property of the debtor shall vest in a receiver, the insolvency proceedings will continue while the receiver's work goes on."

Applying the principles stated above to an annulment order under section 23(1) of the Presidency-towns Insolvency Act it appears clear that the property of the insolvent on being so ordered by the Court, shall vest in the Official Assignee and the insolvency proceedings will continue under the Act so far as the distribution of the property of the insolvent amongst the creditors is concerned. If that inference is valid, then, there is no reason why section 73 should not apply. This aspect of the case does not appear to have been properly considered by the Official Assignee when requesting the High Court to amend the Bombay Insolvency Rules 1910. In the circumstance it does not appear necessary to amend the rules as proposed by the High Court. The High Court's attention may be invited to the legal position as propounded in 52 Mad. 648 which appears to be equally

applicable to an annulment order under section 23(1) of the Presidency-towns Insolvency Act and it may be requested to reconsider whether in the light of the observations made in that case it still considers the amendment necessary.

If the legal position as stated above is correct, Government cannot oppose the distribution of dividends as provided in section 73 of the Presidency-towns Insolvency Act, merely because the present practice which seems to be based on the wrong interpretation of the provisions of the Act yields an income to Government by way of escheat.

P.N.M.

22-10-45

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Remembrancer of Legal Affairs.

U.R.to H.D.No. 7908, dated the 24th October 1945.

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12/7.

Office of the R.L.A.

By virtue of section 17 of the Presidency-towns Insolvency Act, 1909, the equity of redemption of the property mortgaged to Government by Mr. Hardikar now vests in the Official Assignee (see Mulla's Law of Insolvency in British India p. 184), Under section 60 of the Transfer of Property Act the mortgagor has a right to redeem at any time after the principal money has become due. "In the absence of a sepecial condition entitling the mortgagor to redeem during the term of which the mortgage is created, the right of redemption can only arise on the expiration of the specified period; but there is nothing in law to prevent parties from making xk a provision that the mortgagor may discharge the debt within the specified period and take back the property, such a provision being usually to the advantage of the mortgagor" (See Mulla's Transfer of Property Act, p; 377). The Mortgage executed by Mr.Hardikar provides; "The mortgagor shall be at liberty to pay..... at any time any additional sums over and above the monthly instalments etc. and such sums shall be applied to the reduction of the capital sums due". Consequently the Official Assignee is entitled to redeem the mortgage on payment of the balance and the fact that Government contranted to recover by monthly

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deductions from Mr. Hardikar's pay bill is no valid ground for refusing redemption.

P.N.M.
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Remembrancer of Legal Affairs.

U.R. to R.D.No. 9215 dated the 10th December 1945.

Submitted for signature.

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